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Paper No. 12
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Right Brian Trust, LLC

Serial No. 75/757,251

Lawrence Apolzon of Fross Zelnick Lehrman & Zissu, P.C. for
The Right Brain Trust, LLC.

J. Brett Golden, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Simms, Cissel and Quinn, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 21, 1999, applicant filed the above-identified
application to register "THE SENIORS CHANNEL" on the
Principal Register for "television, cable television and
radio broadcasting, and related services," in Class 38; and
"television, cable television and radio programming;
syndication of television, cable television and radio
programs; and related services," in Class 41. The
application was based on applicant's assertion that it

possessed a bona fide intention to use the mark in commerce in connection with these services.

The Examining Attorney¹ refused registration under Section 2(e)(1) of the Lanham Act, 15 U.S.C. Section 1052(e)(1), on the ground that the proposed mark is merely descriptive of the services with which applicant intends to use it. He took the position that the mark merely describes a characteristic or feature of applicant's services because the television and radio programs that applicant intends to produce, syndicate and broadcast are for senior citizens. Enclosed in support of the refusal to register was a dictionary definition² which shows that "senior citizen" is a synonym for the word "senior."

In addition to requiring applicant to amend the recitation of services to be more definite and to disclaim the word "CHANNEL" apart from the mark as shown, the Examining Attorney specifically asked applicant whether it intends to produce, syndicate and broadcast television and radio programs for senior citizens.

¹ Examining Attorney Golden is the third Examining Attorney who has been assigned this application. He took over the case after the Notice of Appeal had been filed and after the previous Examining Attorney had denied applicant's Request for Reconsideration.

² Merriam Webster's Collegiate Dictionary, 10th edition (1999).

Responsive to the first Office Action, applicant did not provide the requested disclaimer or answer the Examining Attorney's question about whether applicant's programs would be intended for senior citizens, but did amend the recitation of services to read as follows: "television, cable television and radio broadcasting services," in Class 38; and "production of television, cable television and radio programming; syndication of television, cable television, and radio programs," in Class 41. Applicant also amended the drawing to show the mark as "THE SENIOR CHANNEL" instead of "THE SENIORS CHANNEL," and presented arguments on the issue of whether the proposed mark is merely descriptive of the services set forth in the application, as amended. Applicant took the position that some degree of imagination or deliberation would be required in order for someone to understand its mark in the descriptive sense asserted by the Examining Attorney because the word "SENIOR" has a number of meanings in addition to the one relied upon by the Examining Attorney.

The Examining Attorney accepted the amendments to the recitation of services and the drawing, but was not persuaded by applicant's arguments against the refusal to register. Submitted in further support of the refusal were

the following: another definition³ of "senior" as "a senior citizen"; a definition of "channel" as "a specified frequency band for the transmission and reception of electromagnetic signals, as for television signals"; excerpts from published articles, retrieved from the Nexis automated database, wherein the term "senior" is used as an adjective to indicate things related to senior citizens, i.e., "senior bus," "senior centers," "senior living facilities," "senior suicides," and "senior volunteers"; twenty third-party registrations in Class 41 for marks including the word "senior" for services relating to senior citizens or elderly people wherein either the mark is registered on the Principal Register under Section 2(f) or with a disclaimer of "senior," or the mark is registered on the Supplemental Register.

The refusal to register under Section 2(e)(1) of a Lanham Act was made final in the second Office Action.

Concurrently with a Notice of Appeal, applicant filed a Request for Reconsideration. In support of its position that the mark is not merely descriptive of the services with which applicant intends to use the mark, applicant

³ From the American Heritage Dictionary of the English Language, 3rd edition (1992), Houghton Mifflin Co.

included a copy of another dictionary listing⁴ for the word "senior." This one lists several different meanings for the term, including "a person older than another"; a senior fellow of a college at an English University; a student in the year preceding graduation from a school of secondary or higher level; and "a member of a program of the Girl Scouts for girls in the ninth through twelfth grade in school." This dictionary also lists "senior citizen" as a synonym for the word "senior."

Also submitted with applicant's Request for Reconsideration were copies of third-party registration and application information retrieved from the U.S. Patent and Trademark Office's Electronic Search System (TESS). This information shows that "SENIORTV THE PROFITABLE ALTERNATIVE" is registered⁵ for distribution of television programming with no disclaimer of "SENIOR"; that "SENIORS WITH ATTITUDE" has been published for opposition⁶ for entertainment services in the nature of a television series geared toward senior citizens without a disclaimer of "SENIOR"; and that "SUDDENLY WE'RE SENIORS" has been published for opposition⁷ for production and distribution of

⁴ Merriam Webster's Collegiate Dictionary, 10th edition.

⁵ Reg. No. 2,151,972, issued on the Principal Register to Stellar Private Cable System, Inc. on April 21, 1998.

⁶ S.N. 75/626,496; Notice of Allowance issued on March 7, 2000.

⁷ S.N. 75/934,270, published for opposition on July 3, 2001.

a television program with no disclaimer of the word "SENIORS."

The Board instituted the appeal, but suspended action on it and remanded the application to the Examining Attorney for consideration of applicant's Request for Reconsideration.

The Examining Attorney denied applicant's request that the refusal to register be withdrawn. Attached to his response were a number of third-party registrations for broadcasting or entertainment services wherein the word "CHANNEL" is either disclaimed or the mark is registered on the Supplemental Register.

Applicant filed an appeal brief and requested an oral argument before the Board. The Examining Attorney filed his brief on appeal and applicant filed a reply brief. Applicant then withdrew its request for an oral hearing. Accordingly, we have resolved this appeal based on careful consideration of the written record and arguments in light of the relevant legal authority.

The sole issue before us in this appeal is whether the mark "THE SENIOR CHANNEL" is merely descriptive, within the meaning of Section 2(e)(1) of the Lanham Act, of "television, cable television and radio broadcasting services," and "production of television, cable television

and radio programming; syndication of television, cable television, and radio programs."

The test for determining whether a mark must be refused registration under this section of the Act is well settled. A mark is merely descriptive of the services with which it is used, or is intended to be used, if it immediately and forthwith conveys information concerning a significant quality, characteristic, feature, function, purpose or use of the services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary for a term to describe all of the properties or characteristics of the services in order for it to be considered merely descriptive of them; rather, it is sufficient if the term describes any significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the services in connection with which registration is sought, the context in which it is, or is intended to be, used in connection with those services, and the possible significance that the term would have to the average purchaser of the services because of the manner of its use. See: In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). A mark is suggestive, rather than merely

descriptive, if, when the services are encountered under the mark, a multi-stage reasoning process, or the use of imagination, thought or perception is required in order to determine what attributes of the services the mark identifies. In re Meyer-Beaton Corp., 223 USPQ 1347 (TTAB 1984). The Examining Attorney bears the burden of establishing that a mark is unregistrable because it is merely descriptive of the services within the meaning of Section 2(e)(1) of the Act. In re Gyulay, supra.

In the case at hand, the Examining Attorney has met his burden of establishing that the proposed mark is unregistrable under Section 2(e)(1) of the Act. "THE SENIOR CHANNEL" is merely descriptive of the television and radio services listed in the application because it immediately and forthwith conveys the significant fact that the programming on applicant's channel will be directed toward seniors.

Applicant does not contend that the article "THE" possesses any source-identifying significance, nor does applicant argue that the word "CHANNEL" is not merely descriptive of its services. In fact, applicant offered to disclaim it apart from the mark as a whole. Applicant's argument centers on the word "SENIOR."

Notwithstanding applicant's earlier failure to answer the Examining Attorney's question of whether the programming is to be directed to senior citizens, applicant conceded (at p.2 of its brief) that it is "...likely [that] a significant portion of the programming will be of interest to senior citizens..." Applicant goes on, however, to contend that "it will be equally available and of interest to viewers of all ages." The later aspect of the services is immaterial to our inquiry, however. Applicant does not contend that the fact that its services will be directed to seniors is not a significant characteristic of them.

In a similar sense, the fact that the word "senior" has other meanings which are not descriptive in connection with the services specified in the registration does not make the proposed mark any less descriptive of these services. As the Examining Attorney points out, his duty is to consider the words sought to be registered in connection with the services recited in the application, rather than in the abstract. One need not be able to correctly guess what the services are from consideration of the mark alone. Descriptiveness within the meaning of the Lanham Act must be determined by considering the mark in connection with the recited services. Applicant's brief makes it clear that applicant's broadcasts and programming

will be of interest primarily to senior citizens. Just as "THE WEATHER CHANNEL" was held merely descriptive of transmitting television primarily concerned with the dissemination of weather information⁸ and "ALL NEWS CHANNEL" was held merely descriptive of television broadcasting and production services wherein the news was the featured subject matter,⁹ the mark applicant in the instant case seeks to register, "THE SENIOR CHANNEL," is merely descriptive of applicant's television and radio broadcasting and programming, which applicant admits will be, in significant part, concerned with seniors.

Finally, the third-party registration and application information applicant made of record in the case at hand does not persuade us to reach a different conclusion. It is well settled that each application must be resolved on its own record and merits, and that a merely descriptive mark is not registrable just because other marks which might appear also to be descriptive are on the register. In re Scholastic Testing Service, Inc., 196 USPQ 517 (TTAB 1977). In any event, the third-party registrations cited by applicant do not appear to run afoul of Section 2(e)(1) of the Act because the marks therein appear to be unitary

⁸ In re Weather Channel, Inc., 229 USPQ 854 (TTAB 1986).

⁹ In re Conus Communications Co., 23 USPQ2d 1717 (TTAB 1992).

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marks or slogans for which disclaimers or claims under Section 2(f) would not be appropriate.

In summary, because "THE SENIOR CHANNEL" would immediately and forthwith convey the fact that applicant's broadcasting and programming will be directed to senior citizens, the proposed mark is merely descriptive within the meaning of Section 2(e)(1) of the Lanham Act.

DECISION: The refusal to register is affirmed.